Supreme Court, U.S.
FILED
MAR 7 2000
CLERK

No. 99-1319

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, *EX REL.*
RON WEDDINGTON,

Petitioner,

v.

SCOTT & WHITE MEMORIAL HOSPITAL;
SCOTT & WHITE CLINIC;
SCOTT, SHERWOOD AND BRINDLEY FOUNDATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT C. (BOB) BURLESON, JR.*
KEITH C. CAMERON
OF
NAMAN, HOWELL, SMITH & LEE, P.C.
First National Bank Building
P. O. Box 844
Temple, Texas 76503
(254) 778-1354
FAX (254) 774-7254

**Counsel of Record*

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

PARTIES TO THE PROCEEDING

The petition correctly lists the interested parties in the caption of the case. Respondents have no additional parent companies or affiliates other than the Respondents themselves.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

Course of Proceedings and Disposition in the Courts Below 1

Statement of Facts 1

REASONS FOR DENYING THE WRIT 4

First Ground – This Case Does Not Merit Supreme Court Review 5

Second Ground – Had the Fifth Circuit Provided Reasons for its Decision it Would Have Been Proper to Affirm 7

Third Ground – Even if the District Court Had Jurisdiction, the Stipulated Facts Show No Violation of the False Claims Act 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Federal Recovery Serv., Inc. v. United States, 72 F.3d 447 (5th Cir. 1995) 5, 6

United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) 5

United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994) 5

United States v. A.D. Roe Co., Inc., 186 F.3d 717 (6th Cir. 1999) 5

United States v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999) 5

RULES AND STATUTES

31 U.S.C. § 3730 (e)(4) 7, 8, 10, 11

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Scott and White Memorial Hospital; Scott and White Clinic; and Scott, Sherwood and Brindley Foundation (collectively "Scott and White"), respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, United States of America, ex rel. Ron Weddington.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below.

Petitioner accurately states the course of the proceedings and disposition in the courts below.

Statement of Facts

On July 16, 1991, Charles Hyatt was a patient of Scott and White in Temple, Texas. On July 19, 1991, a Scott and White physician operated on Mr. Hyatt. Unknown to the physician, a surgical nurse placed the angiograms in the viewbox backward, so that left and right was reversed. In addition to performing a repair of aneurysm and aortofemoral graft, the physician mistakenly and negligently removed Mr. Hyatt's left kidney, because he believed the left kidney to be non-functioning. Mr. Hyatt had no kidney function following the nephrectomy, necessitating dialysis and other reasonable and necessary care for the loss of kidney function.

Shortly after the operation, Mr. Hyatt was placed on dialysis. This treatment and all other treatment received by him following the surgery was reasonable and necessary to treat his illness and the amounts charged for the treatment were reasonable. Mr. Hyatt remained a patient of Scott and White until his death on or about January 6, 1992. The loss of his only good kidney caused or contributed to his death.

Mr. Hyatt was insured by Medicare and a private Medicare Supplement. Sometime after September 20, 1991, Scott and White billed Medicare for the reasonable and necessary medical treatment necessitated by the removal of his left kidney. The amount received by Scott and White from Medicare was $64,879.63. Of this amount, $24,000.00 represents the amount paid for the repair of the aneurysm and the aortofemoral graft and the reasonable and necessary treatment related to those procedures and $40,879.63 represents the amount paid for the reasonable and necessary treatment required following the nephrectomy and subsequent renal bypass, including dialysis.

Scott and White did not bill Medicare for the negligent removal of the wrong kidney but did bill for reasonable and necessary treatment resulting from the nephrectomy and the renal bypass.

In September of 1991, Ron Weddington, the present *qui tam* Plaintiff and Petitioner, was retained to represent Mr. Hyatt against Scott and White. Following Mr. Hyatt's death on January 6, 1992, Petitioner represented Hyatt's estate and family. Scott and White received notice of a

potential claim by Hyatt and/or Hyatt's estate and family on September 17, 1991.

During settlement negotiations between counsel for Scott and White and Petitioner, Petitioner became aware of the existence of a Medicare lien. Petitioner notified Medicare of the claim and the possibility that, pursuant to the Federal Medical Care Recovery Act, Medicare might be entitled a reimbursement of payments made to Scott and White for Mr. Hyatt's treatment.

A settlement was reached between Scott and White and Hyatt's estate and family. Medicare informed Petitioner prior to the finalization of the settlement that the amount of the Medicare lien was $64,879.63. The parties agreed that the settlement proceeds paid by Scott and White would be applied to totally discharge the Medicare lien. Scott and White fully paid the settlement amount.

Because the Plaintiffs included the minor children of Mr. Hyatt, the parties filed a friendly suit for court approval of the settlement. In a public proceeding on October 2, 1992, to approve the settlement, the parties presented the Settlement Agreement and Release and the final judgment which were approved by the judge presiding over the friendly suit. In the court's record approving the settlement, the fact that Scott and White submitted claims for reimbursement to Medicare was apparent, as evidenced by the trial judge's statement, "In addition, there will be a Medicare lien of $64,879.63 paid [as part of the settlement]." The papers regarding the friendly suit are public record and are on file in the district clerk's office. The Settlement Agreement and Release and Final Judgment were approved and executed by Hyatt's estate

and family, the guardian ad litem, Petitioner as counsel for Hyatt's estate and family, and counsel for Scott and White. The Medicare lien was satisfied in full from the settlement proceeds pursuant to the written Settlement Agreement and Release.

Petitioner subsequently filed this *qui tam* lawsuit alleging that Scott and White filed a fraudulent or false claim with Medicare based on the claims that Scott and White submitted for reimbursement.

REASONS FOR DENYING THE WRIT

Although not clearly articulated, Petitioner appears to assert two reasons why this Court should grant his Petitioner for Writ of Certiorari in this case. First, Petitioner believes a conflict exists among the circuits regarding the interpretation of a "public disclosure" under the False Claims Act. Whether such a conflict exists is immaterial to this case. The Fifth Circuit in its decision provided no analysis or interpretation, but merely affirmed the District Court with a one-word, unpublished opinion. Therefore even if a conflict exists among the circuits, it would not include this case. Additionally, even if the Fifth Circuit had provided reasons for its decision, the court would have been correct in determining that the District Court had no subject matter jurisdiction of the case because the facts regarding the alleged False Claims Act violation were publicly disclosed and Petitioner was not the original source.

Second, Petitioner asserts that the Court should grant the writ to determine if there was a violation of the False

Claims Act under the facts of this case. As the court is aware, a petition for writ of certiorari is rarely granted for the purpose of making factual findings, particularly when, as in this case, neither the district court nor the court of appeals addressed the merits of the alleged False Claims Act violation. Nonetheless, the stipulated facts clearly show no violation of the False Claims Act.

First Ground – This Case Does Not Merit Supreme Court Review

Petitioner argues that this Court should grant review because of a conflict among the circuits regarding the interpretation of a "public disclosure" under a subject matter jurisdiction analysis under the False Claims Act. Petitioner states that the Fifth Circuit's opinion in *Federal Recovery Serv., Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995) leaned toward the view of the Fourth Circuit's opinion in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994), regarding the interpretation of the public disclosure element that any information disclosed through civil litigation and on file with the clerk's office should amount to a public disclosure of allegations. Petitioner further argues that the D.C. Circuit in *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), the Seventh Circuit in *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), and the Sixth Circuit in *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717 (6th Cir. 1999) have a different interpretation of what constitutes public disclosure that requires actual disclosure of fraud or its elements. Petitioner concludes that, because the Fifth Circuit in the present case affirmed the District Court's

judgment, "it must be assumed that they (the Fifth Circuit) agreed with the District Judge's reasoning" which relied upon *Federal Recovery Services*. Petitioner's conflict argument is misplaced. The present case involves an unpublished district court order that was affirmed in a one-word unpublished decision by the Fifth Circuit. The Fifth Circuit provided no discussion, analysis or reason for affirming the district court's order. If the Fifth Circuit in another case provided an analysis or interpreted the meaning of "public disclosure" that conflicts with other circuits then those cases would be more desirable for the Court's review – not the present case. The reasons the Fifth Circuit affirmed the District Court's order are unknown; therefore, this case cannot be in conflict with other circuits.

Additionally, the stipulated facts of this case are not conducive to an analysis regarding the conflict among the circuits, if any, as to what facts must be disclosed to meet the public disclosure element. The facts clearly show that Scott and White committed no fraud in its billing to and reimbursement by Medicare. Because there was no fraudulent conduct by Scott and White, determining that the specific fraudulent conduct must be disclosed to meet the public disclosure element would not be possible. The primary fact that Petitioner relies on is that Scott and White billed Medicare, a fact that was publicly disclosed at the friendly suit hearing. Accordingly, the facts of this case and the absence of any analysis by the Fifth Circuit are reasons why this case does not merit review.

Second Ground – Had the Fifth Circuit Provided Reasons for its Decision it Would Have Been Proper to Affirm

First, despite Petitioner's argument that he would have had jurisdiction in some circuits and not others, the facts of this case show that the False Claims Act is not even applicable. The underlying facts show that this was a typical situation in which a medical malpractice claim was settled. Pursuant to Medicare reimbursement statutes, the existing Medicare lien was reimbursed from the proceeds of the settlement. Because the Medicare reimbursement statutes specifically applied to this case and provided the remedy of the government – reimbursement – the False Claims Act is not applicable. There simply was no fraudulent conduct, but a pure application of the Medicare reimbursement statute.

Second, even if the False Claims Act applies, the district court had no subject matter jurisdiction. Section 3730(e)(4) of the False Claims Act limits the subject matter jurisdiction of courts adjudicating *qui tam* actions. It provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

The courts employ a three-part inquiry to determine the applicability of § 3730(e)(4):

> (1) Whether there has been a "public disclosure" of the allegations or transactions;
>
> (2) Whether the *qui tam* action is "based upon" such publicly disclosed allegations; and
>
> (3) If so, whether the relator is the "original source" of the information.

An application of the elements reveals that Petitioner cannot meet the jurisdictional test. The district court lacked subject matter jurisdiction over Petitioner's action pursuant to 31 U.S.C. § 3730(e)(4) because: (1) there had been a prior public disclosure of the allegations or transactions in a civil hearing upon which Petitioner's action was based; and (2) Petitioner was not an "original source" of the information as he did not have direct and independent knowledge of the information on which the allegations were based.

With regard to the first element, prior to the filing of this case, there was a "public disclosure" of the allegations or transactions contained in Petitioner's complaint. Without question, the facts underlying the claims in this lawsuit had previously been in the public domain. Section 3730(e)(4)(A) requires that the disclosure occur "in a

criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." On September 24, 1994, Petitioner's clients, Dawn Darling, James Hyatt, Katherine Hyatt, and Cecil Rigsby, filed a civil lawsuit, cause number 92-13754, styled *"Dawn Darling; James Hyatt; Katherine Hyatt, Through her Next Friend, Addie Domino; and Cecil Rigsby, Administrator of the Estate of Charles Hyatt vs. Scott & White Clinic, an Association; Scott & White Memorial Hospital; and Scott, Sherwood and Brindley Foundation, a Texas Non-Profit Corporation,"* in the 147th District Court of Travis County, Texas. The suit, a malpractice action concerning the medical treatment provided to Mr. Hyatt by Scott and White, ultimately resulted in a court-approved settlement and final judgment signed on October 2, 1992. At the final hearing also held and recorded on October 2, 1992, the fact that Scott and White had submitted claims for reimbursement to Medicare for Mr. Hyatt's treatment was apparent, as evidenced by the court's statement: "In addition, there will be a Medicare lien of $64,879.63 paid [as part of the settlement]." The same facts underlying the very existence of that Medicare lien form the basis of Petitioner's False Claims Act lawsuit. The basis of Petitioner's complaint relates to Scott and White's request to Medicare for reimbursement for certain reasonable and necessary medical treatment. Because Scott and White's conduct did not amount to fraud, there was no public disclosure of fraud, but there was a public disclosure of the alleged basis of fraud in Petitioner's complaint. Accordingly, under the first part of the test, there was a

public disclosure of the allegations contained in Petitioner's complaint.

With regard to the next element, Petitioner's lawsuit is at least partially based upon the allegations and transactions publicly disclosed in the previously filed and resolved medical malpractice cause in Travis County, Texas. As already referenced above, the heart of Petitioner's claims in this action stems from the fact that Scott and White submitted claims to Medicare for reimbursement for the medical treatment provided to Mr. Hyatt, a fact that was publicly disclosed in the Travis County action long before the filing of the instant lawsuit. Therefore, under the second prong of the test, the action is "based upon" the publicly disclosed allegation.

Accordingly, the district court did not have subject matter jurisdiction over the present action unless Petitioner could show that he was an "original source" under the False Claims Act. Section 3730(e)(4)(B) defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based." Petitioner's knowledge of Scott and White's submission of claims to Medicare, far from resulting from the fruits of his own labor, arose solely in the context of his legal representation of the Hyatts and his negotiations with Scott and White on his clients' behalf. Petitioner was, in fact, notified of the allegations making the basis of his negligence claim *by Mr. Hyatt and his clients*, notified of Scott and White's submissions to Medicare *by Scott and White and Scott and White's attorney*, and notified of the lien and its amount *by Medicare*, making him, at most, a secondary source, wholly lacking in direct and independent knowledge. Thus, it is impossible

to conclude that Petitioner is an "original source." Accordingly, Petitioner cannot meet the 3-pronged test. The district court properly found that it was without subject matter jurisdiction over Petitioner's action pursuant to 31 U.S.C. § 3730(e)(4) which the Fifth Circuit correctly affirmed.

Third Ground – Even if the District Court Had Jurisdiction, the Stipulated Facts Show No Violation of the False Claims Act

Petitioner asks this Court to make a finding of a violation of the False Claims Act under the specific facts of this case even though both the district court and Fifth Circuit refused to do so. Making fact findings on the specific circumstances of individual cases is far beyond this Court's scope of review. Nonetheless, a brief review of the facts shows no violation of the False Claims Act.

The most bothersome aspect of this case is that it has now been before the district court, the Fifth Circuit and the Supreme Court and the stipulated facts unquestionably show that there was no violation of the False Claims Act. The basic premise behind Petitioner's whole argument is that Scott and White allegedly billed Medicare for treatment it knew was negligent. This argument by Petitioner is simply not true and is a misrepresentation of the stipulated facts. Scott and White did not bill Medicare for the negligent treatment of removing the wrong kidney. Scott and White did bill Medicare and subsequently reimbursed Medicare for expenses that were stipulated to be reasonable and necessary and that were not performed negligently. Accordingly, it is inconceivable that billing

Medicare for treatment that was reasonable and necessary could amount to fraud.

Moreover, Petitioner's argument that the attestations of the claims submitted to Medicare fraudulently failed to recognize that the medical treatment was a "misadventure to patients during surgical and medical care" is likewise misplaced. With regard to the treatment in question, as the expert testimony in the district court affirmed, the attestation codes for "misadventures" would only apply to the negligent removal of the wrong kidney. However, as stated above, Scott and White appropriately did not submit a claim for such negligent treatment even though Scott and White certainly could have properly submitted a claim for the negligent removal of the kidney and identify it as a "misadventure." However, it is not Scott and White's failure to submit this claim that Petitioner argues was fraudulent. Petitioner argues that submitting a claim for the reasonable and necessary medical treatment following the negligent removal should have been identified as a "misadventure." This argument is without merit. Such treatment was not a "misadventure" and was not performed negligently. Whether Scott and White or another health care provider provided this treatment, such treatment was reasonable and necessary following the negligent removal of the kidney. In addition, Scott and White reimbursed Medicare for such reasonable and necessary treatment. Scott and White clearly used the appropriate attestation codes and, accordingly, did not commit fraud.

Liability in cases involving Medicare healthcare fraud is generally found where the government is billed for goods or services that were actually not delivered or

billed for higher priced goods or services than those actually provided. There simply is no claim or facts to support an allegation that Scott and White submitted a claim for services which were not actually provided or which were a lessor quality than those charged or for which the wrong amount was charged. Not only did Scott and White not submit a claim for the negligent treatment, it reimbursed Medicare for reasonable and necessary treatment which was covered by Medicare and for which Medicare probably had no right of reimbursement. Simply because treatment was performed negligently does not mean that Scott and White acted fraudulently. Scott and White's claims to Medicare and subsequent reimbursement were entirely appropriate and completely without fraud. Therefore, this case that is now before the Supreme Court began purely as an academic exercise in jurisdiction under the False Claims Act with no basis whatsoever of a violation of the False Claims Act. The district court and Fifth Circuit properly dismissed Petitioner's claims and likewise this Court should deny review.

CONCLUSION

Petitioner has failed to provide any compelling reason for this Court to grant a Writ of Certiorari. The Fifth Circuit did not provide any reasons, analysis or interpretation of the legal issues involved in this case and therefore, the decision below does not and cannot conflict with another Circuit. Additionally, the district court and Fifth Circuit were correct in their decisions. This case does not merit further review by this Court.

For all the foregoing reasons, Respondents request that the petition be denied.

Respectfully submitted,

ROBERT C. (BOB) BURLESON, JR.
KEITH C. CAMERON
OF
NAMAN, HOWELL, SMITH & LEE, P.C.
First National Bank Building
P. O. Box 844
Temple, Texas 76503
(254) 778-1354
FAX (254) 774-7254